

Honorable Ronald B. Leighton
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KRISTINE M. NEIDINGER,

NO. C10-5702 RBL

Plaintiff,

vs.

MOTION IN LIMINE

Noted on Motion Docket: 09/14/2012

COUNTY OF PIERCE; ELIZABETH
WYATT EARP; RICHARD D. MALIDORE
and LOIS K. MALIDORE and the marital
community thereof; JAMES PATRICK
WILLIAMS and REBEKAH JILL
WILLIAMS and the marital community
thereof; and JULIE McARTHUR and
ALLEN McARTHUR and the marital
community thereof,

Defendants.

COMES NOW the Defendants COUNTY OF PIERCE; ELIZABETH WYATT
EARP; RICHARD D. MALIDORE and LOIS K. MALIDORE and the marital community
thereof; JAMES PATRICK WILLIAMS and REBEKAH JILL WILLIAMS and the marital
community thereof; and JULIE McARTHUR and ALLEN McARTHUR and the marital
community thereof, by and through their attorneys of record, Mark Lindquist, Pierce County
Prosecuting Attorney, and Michelle Luna-Green, Deputy Prosecuting Attorney, and moves

1 the Court for an Order in Limine on the topics set forth below. This motion is to exclude any
2 and all reference, testimony, or admission of evidence as outlined below.

3 **1. DISCIPLINE RECORDS AND PERSONNEL FILES**

4 Defendants' personnel files contain investigations with largely unsubstantiated
5 incidents which are not relevant to the facts of this case and should therefore be excluded per
6 FRE 401, 402, 403, 404(b).

7 **a. FRE 401 & 402**

8 Prior internal affair investigations have no relevance to whether or not the alleged
9 excessive force occurred here. FRE 401, 402, 802. The Court should exclude any reference
10 to prior internal affair investigations of any named Defendant in this matter.

11 **b. FRE 403 & 404(b).**

12 This Court has discretion to exclude even relevant evidence where the probative value
13 is substantially outweighed by the prejudicial effect. FRE. § 403. In *Maddox v. City of Los*
14 *Angeles*, 792 F.2d 1408, 1417-1418 (9th Cir. 1986), the Ninth Circuit excluded a relevant
15 internal police investigation because the report was more prejudicial than probative. This
16 Court should exclude any internal investigations contained in the Defendants' personnel files
17 for similar reasons. The Maddox Court was particularly concerned that the jury might infer
18 the defendant was guilty of wrongdoing merely because the Department initiated an internal
19 affairs administrative proceeding. See *Maddox*, 792 F.2d at 1417-18. Despite the fact that
20 Sgt. Malidore has never had a substantiated complaint, there is a substantial risk that the jury
21 might similarly misuse this information by giving "unfair or undue weight to this evidence, or
22 [being] confused as to the relevance." *Id.*

1 Admitting into evidence other complaints of alleged misconduct contained in
2 Defendants' personnel files can have no other effect than to attack their character and show
3 they possess a propensity for committing bad acts. This is precisely the use that FRE 404(b)
4 prohibits. Using these documents to show that a defendant is a "quarrelsome individual," or
5 that a defendant "has a penchant to use more force than is reasonably necessary" violates Rule
6 404(b). Martin A. Schwartz, *Section 1983 Litigation: Federal Evidence* § 2.06 (4th ed. 2011
7 Supp.).
8

9 **c. FRE 802**

10 Lastly, the officer-generated incident reports contain hearsay within hearsay and
11 should be excluded. FRE 802. Plaintiff has not named any of the witnesses involved in the
12 internal affairs investigations and therefore any accusations or statements taken during those
13 investigations are inadmissible hearsay.

14 **2. PLAINTIFF'S TESTIMONY REGARDING HER INJURIES**

15 Plaintiff has not named any medical doctors as witnesses in this matter. Any opinions
16 that Plaintiff was injured as a direct result of Defendants' alleged use of excessive force must
17 be excluded as there is no causal connection. Plaintiff is not a medical expert and may not
18 offer any opinion(s) on causation. FRE 701-702.
19

20 Plaintiff may only testify as to what she personally felt and/or observed during the
21 alleged use of excessive force by the officers. She may testify as to what her physical
22 condition was before her arrest, however, she may not offer any opinions that as a result of the
23 tasing or choking she: vomited, urinated, she died, lost consciousness, suffered chronic and
24 ongoing numbness, or any other medical condition.
25

1 **3. LIMIT EXPERT TESTIMONY OF THOMAS BURWELL**

2 **a. Testimony Should Be Limited to the Issue Before the Jury:**
 3 **Whether the Force Was Reasonable**

4 Plaintiff's expert, Thomas Burwell, is expected to present use of force testimony for
 5 Ms. Neidinger and render an opinion that the use of force in this case was unreasonable.
 6 Pontification or opinions outside the issue of whether the force was reasonable is irrelevant,
 7 unduly prejudicial, and not helpful to the trier of fact. FRE 401, 402, 702. The expert should
 8 not be allowed to testify to his other beliefs regarding the use of force including, but not
 9 limited to:

- 10 (a) "[That] [t]o administer this type of force for no good reason (this type
 11 of pain) is considered Torture.
 12 (b) "[It] is shocking to the conscious."
 13 (c) That the use of force in this case was criminal conduct amounting to
 14 assault or battery.

15 The Defendants seek exclusion of any of the above phrases or conclusions that fall
 16 outside whether the use of force was reasonable.

17 **b. Testimony Regarding County Policy or Lack Thereof is Irrelevant**

18 Plaintiff's expert may try to testify to whether Pierce County had a policy or procedure in
 19 place to monitor the use of tasers, but such testimony is irrelevant. FRE 401, 402; *See Also*
 20 *Argument Infra* §4.

21 **4. INTERNAL POLICIES DO NOT CREATE DUTIES**

22 The County is no longer a named party in this matter. Dkt. 48 – Second Amended
 23 Complaint. Therefore, any evidence regarding County liability under *Monell*,¹ including
 24 policy and training, is irrelevant. FRE 401, 402. Further, the Supreme Court has rejected that
 25 compliance or noncompliance with a local policy or practice material to the question of

¹ *Monell v. Dep't. of Social Services*, 436 U.S. 658, 691 (1978).

1 whether a single act violated individual's constitutional rights when examining qualified
2 immunity:

3 Moreover, police enforcement practices even if they could be practicably
4 assessed by judge, vary from place to place and time to time. We cannot
5 accept that this search and seizure protections of the Fourth Amendment are so
variable and can be made to turn upon such trivialities.

6 *Whren v. United States*, 517 U.S. 806, 815.

7 The Plaintiff should not be allowed to suggest in any manner that policies create a
8 legal duty or that any inconsistency with policies establish a constitutional violation.

9 **5. NO REFERENCE TO INSURANCE OR INDEMNIFICATION UNDER**
10 **PIERCE COUNTY CODE**

11 Any mention of insurance, insurance coverage, insurance policy limits, or indemnification
12 is excludable under FRE 411. Plaintiff should not seek to offer any testimony or evidence
13 regarding insurance or indemnification of the individual Defendants under the Pierce County
14 Code.

15 DATED this 27th day of August, 2012.

16 MARK LINDQUIST
17 Prosecuting Attorney

18 s/ MICHELLE LUNA-GREEN
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CERTIFICATE OF SERVICE

On August 27, 2012, I hereby certify that I electronically filed the foregoing MOTIONS IN LIMINE with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- **Christopher Taylor:** taylor@ftlawps.com

s/ CHRISTINA M. SMITH
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CERTIFICATE OF COMPLIANCE WITH LCR 7(d)(4)

I hereby certify that I have conferred with opposing counsel as to the foregoing Motions in Limine.

CERTIFIED this 27th day of August, 2012.

MARK LINDQUIST
Prosecuting Attorney

s/ MICHELLE LUNA-GREEN
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